

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SOFCO, INC.	:	DETERMINATION
for Redetermination of Eligibility for	:	
Corporation Franchise Tax Credits under	:	
Article 9-A of the Tax Law for the Fiscal Year	:	
Ended May 31, 1986.	:	

Petitioner, Sofco, Inc., 702 Potential Parkway, Scotia, New York 12302, filed a petition for redetermination of eligibility for corporation franchise tax credits under Article 9-A of the Tax Law for the fiscal year ended May 31, 1986 (File No. 804025).

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on May 23, 1990, with all briefs to be submitted by November 6, 1990. Petitioner appeared by Mary Ann Racicot, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether the former State Tax Commission properly refused to certify petitioner's eligibility for business facility tax credits because its business facility, which had received initial approval from the Job Incentive Board, was relocated.

FINDINGS OF FACT

In the summer of 1981, Dixico, Inc., the owner of Stevens and Thompson Paper Company, decided to shut down the paper company's manufacturing facility in Halfmoon, a town in Saratoga County. Petitioner, Sofco, Inc. (hereinafter "Sofco"), at the time, was a wholesaler of paper goods and owned a 130,000 square foot facility in Scotia, New York and rented a warehouse facility in Utica. It was interested in purchasing the Halfmoon manufacturing facility. By a letter dated August 24, 1981, Sofco sought advice from the Job

Incentive Bureau of the New York State Department of Commerce whether job incentive tax credits would be available if it exercised an option to purchase the paper company's realty, machinery and equipment:

"It is our understanding that if Sofco did not exercise its' [sic] option, this facility would be closed and the machinery and equipment sold to a Massachusetts manufacturing firm. This would result in a loss of 24 jobs for New York State.

* * *

The availability of New York State job credits will be an important factor in our decision as to whether we exercise our option by August 31, 1981 to purchase this manufacturing facility...."

On October 20, 1981, the Job Incentive Board granted initial approval to Sofco's application for participation in the Job Incentive Program and advised petitioner:

"The next step for you to take in order to qualify for state tax credits...is to submit to the Board an Affidavit of Compliance.... Upon approval of the Affidavit by the Board, a Certificate of Eligibility will be issued to you....

The certificate...is to be submitted with your annual tax filing...."

Subsequently, the Job Incentive Board issued a Certificate of Eligibility for State Franchise Tax for the base period ended May 29, 1982. The certificate noted that Sofco's business facility in Halfmoon, which first became eligible for tax credits on August 1, 1981, had created or retained 38 jobs. For its fiscal year ended May 29, 1982, petitioner applied against its corporate franchise tax liability an Eligible Business Facility Tax Credit of \$8,526.00. Similarly, for fiscal years ended May 28, 1983, May 26, 1984 and June 1, 1985, petitioner received certificates of eligibility and applied eligible business facility tax credits of \$24,991.00, \$24,539.00 and \$26,904.00 against its corporation franchise tax liability for the respective years.

By a letter dated September 10, 1986, the Division of Taxation determined that Sofco did not qualify for a franchise tax credit for the fiscal year ended May 31, 1986. The following explanation was provided:

"As the facility located at 602 Potential Parkway, Scotia, New York was not [emphasis in the original] approved by the Job Incentive Board, your Certificate of Eligibility for Eligible Business Facility has been denied."

According to the affidavit of James Gargiulo, Sofco's president, petitioner's manufacturing division, originally located at Elizabeth Street, Town of Halfmoon (Saratoga County), transferred its operations including personnel and equipment to 702 Potential Parkway, Scotia, New York, (Schenectady County) during the corporation's fiscal year ended May 30, 1986. Mr. Gargiulo also noted in his affidavit that "the transfer was due to hazardous conditions beyond the control of Sofco, Inc."

A review of correspondence between Sofco and its insurer, Hartford Fire Insurance Company, reveals that as early as September 1982, there was a problem with the amount of water available to fight a fire at the Halfmoon property. Edward J. Matthews, Inc., the sprinkler contractor who had serviced the sprinkler system covering the Halfmoon property since the 1950's, performed a test on the water mains servicing Sofco's warehouse and manufacturing building in Halfmoon, and in a letter to petitioner's insurance agency, dated October 15, 1984, stated:

"(W)e found that we still didn't have sufficient volume for the necessary fire protection for the spr. sys. covering the above property.... We have also found out that this property at one time had an alternate supply of water and the fire lines were serviced from two different points. Point #2 was disconnected and capped. I do believe that this is why we do not have the volume that once was available. The single source of supply that we now have comes off the City Main and we have also found out that the water supply is not properly gridded in...."

Subsequently, Sofco hired¹ The Environmental Design Partnership, an engineering firm, which analyzed the "fire flow conditions and hydraulic limitations" at the Halfmoon facility. The engineer's report dated February 22, 1985 reached the conclusion that:

"The entire main between the fire house and the factory would have to be replaced to enable fire flows of 750 gallons per minute at the factory [the minimum fire flow requirement at the plant according to the engineer]."

There is no specific evidence in the record concerning the expense and difficulty of replacing the entire main between the firehouse and the factory, but it is noted that the map

¹The engineering firm was initially retained to prepare engineering drawings for the installation of 800 feet of 10" ductile iron water main which had been proposed as a solution for upgrading the flow of water at the plant.

(which has no designated scale) appended to the engineer's report shows the firehouse to be located more than five blocks from the factory. No doubt the cost to correct the flow problem was excessive, and instead Sofco decided to transfer the Halfmoon manufacturing operation to its Scotia location.

Mr. Gargiulo, in his affidavit, also stated that:

"(A)ll employees located at the Town of Halfmoon facility were offered a transfer to the Scotia facility which is within commuting distance of the Town of Halfmoon. That at the time of the change of location (October 1985 payroll records) the Halfmoon facility had 31 employees who resided in the immediate area of the facility. That in the year subsequent to the transfer (May 1986 payroll records) there were 28 employees who were residents of the Halfmoon/Mechanicville area."

SUMMARY OF THE PARTIES' POSITIONS

The Division argues that relevant regulations adopted in 1989 note expressly that the eligible business facility must be at the identical location "with regard to which a taxpayer has received initial approval". It further contends that the Commissioner of Taxation and Finance does not have authority to grant new credits for other facilities owned by the taxpayer, and, in sum, Sofco has no right to participate in the Job Incentive Program for a facility not covered by its initial application.

In contrast, the position of Sofco is that the Commissioner has authority to "modify" a certificate of eligibility for tax credits, and the "unusual circumstances" herein justify a modification which would permit the relocation of petitioner's manufacturing facility.

CONCLUSIONS OF LAW

A. The New York State Job Incentive Board was created in 1968 "to encourage industrial and other business enterprises to locate, expand and improve facilities in economically underprivileged urban areas² and to provide job opportunities and job training programs for residents of such areas" (L 1968, ch 1054, § 1).

²In 1976, the definition of "eligible areas" was expanded to include "any county" (L 1976, ch 798).

B. Commerce Law former Article 4-A provided a detailed statutory framework for the determination whether "any business facility is an eligible business facility for purposes of the credits...provided and authorized by the tax law..." (Commerce Law former § 117[b]).

C. When Commerce Law Article 4-A was repealed (L 1983, ch 15),³ the responsibility of the Job Incentive Board for monitoring the eligibility of a business facility for tax credits was transferred to the former State Tax Commission, which was empowered "to renew, extend, revoke or modify a certificate of eligibility for tax credits, pursuant to section one hundred twenty of the commerce law as such section existed on March thirty-first, nineteen hundred eighty-three" (Tax Law § 210.11[h]; see Matter of Columbian Mutual Life Insurance Company, Tax Appeals Tribunal, August 4, 1988). The Tax Commission was authorized to issue certificates of eligibility for tax credits only if the:

"[T]axpayer has prior to July 1, 1983, received from the...job incentive board initial approval of an application for such certificate by such board...or a letter of intent...regarding such certificate of eligibility..." (Tax Law § 210.11[h]).

Furthermore, Tax Law § 210.11(a) expressly provides that a credit "shall be allowed only to a taxpayer owning or operating an eligible business facility where such taxpayer has received a certificate of eligibility for tax credits...for such facility..." (emphasis added).

D. Effective May 9, 1989, tax regulations were promulgated which provide a detailed description of the manner in which the eligible business facility credit is calculated (20 NYCRR 5-1.2) and a description of the job

incentive program as administered by the Commissioner of Taxation and Finance⁴ (20 NYCRR

³Laws of 1983 (ch 15) represented the enactment of a governor's budget bill and the portion at issue herein relates to "the phasing-out of tax credits authorized by the Job Incentive Program...and authorizes the Tax Commission...to administer the phase-out of the program" (Memorandum In Support, Governor's Bill Jacket, L 1983, ch 15).

⁴Effective September 1, 1987, under Tax Law § 2026 references to the State Tax Commission in the Tax Law, in all instances other than in relation to the administration of the administrative

Appendix 1).

E. The current tax regulations would seem to address the specific issue at hand:

"'Eligible business facility' means a place of business which meets the requirements of section 118 of the Commerce Law as such section existed on March 31, 1983. It is the business facility at the identical location with regard to which a taxpayer has received initial approval" (20 NYCRR Appendix 1 [a][3]). (Emphasis added.)

The facility for which Sofco seeks a certificate of eligibility for the fiscal year at issue is located in Scotia (Schenectady County) and plainly is not at the identical location of the facility which received initial approval from the Job Incentive Board, which was in Halfmoon (Saratoga County).

Although this cited regulation is effective May 9, 1989, after the period at issue, it is in harmony with the statutory scheme for the allowance of eligible business facilities tax credits. Commerce Law former § 118(a)-(e) sets forth the requirements which had to be met in order for a business to be eligible for tax credits. It specifically required that the facility be located in "an eligible area". The Job Incentive Board determined that the facility in Halfmoon was located in an eligible area. It never determined whether the Scotia location was an eligible area, which points up the fact that Sofco is seeking to obtain credits for a facility other than the one found eligible by the Job Incentive Board.

F. The Commissioner of Taxation and Finance does not have authority to grant credits for facilities other than those previously approved. The change in the administration of the job incentive program was not merely to transfer power from the Job Incentive Board to the Tax Commissioner but, in fact, was primarily to wind down the program. In short, the Division's refusal to certify Sofco's eligibility for business facility tax credits for the period at issue was reasonable, and petitioner has failed to clearly establish its right to such credits (cf. Matter of Grace v. State Tax Commn., 37 NY2d 193, 371 NYS2d 715, lv denied 37 NY2d 708, 375

hearing process, are deemed to refer to the Division of Taxation or Commissioner of Taxation and Finance.

NYS2d 1027). It should be noted that petitioner's position that the power to "modify" a certificate of eligibility authorizes the Commissioner to determine that its new facility in Scotia qualifies for tax credits renders the statutory limitation on the Commissioner set forth in Tax Law § 210.11(a) meaningless (cf. Matter of Morton Buildings, Inc. v. Chu, 126 AD2d 828, 510 NYS2d 320, affd 70 NY2d 725, 519 NYS2d 643) and misinterprets the meaning of the word "modify". The substitution of Sofco's facility in Scotia for the Halfmoon facility on its certificate of eligibility is not a mere modification of a certificate, but rather, in effect, would be the allowance of a tax credit for a facility other than the one previously approved by the Job Incentive Board.

G. The petition of Sofco, Inc. is denied.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE